

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

13 BEFORE : THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

STATUS CONFERENCE

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P R O C E E D I N G S

THE CLERK: Criminal case 18-422, United States of America versus Michael Lacey and others.

This is the time set for status conference.

MR. RAPP: Good morning, Your Honor. Kevin Rapp,
Reggie Jones, John Kucera, Andrew Stone and Peg Perlmetter on
behalf of the United States.

THE COURT: Good morning to all of you.

MR. CAMBRIA: Morning, Your Honor. Paul Cambria on behalf of Mr. Lacey, who is here.

THE COURT: Good morning.

MR. CORN-REVERE: Good morning, Your Honor. Robert Corn-Revere, Davis Wright Tremaine, for Mr. Larkin and Lacey.

THE COURT: Good morning.

MR. BIENERT: Good morning, Your Honor. Thomas Bienert on behalf of Mr. Larkin, who is present.

THE COURT: Good morning, Your Honor.

MR. FEDER: Morning, Your Honor. Bruce Feder for
Scott Spear, who is also present.

THE COURT: Good morning.

MR. WEISS: Your Honor, good morning. Steve Weiss on behalf of Joye Vaught, and I waive her presence.

THE COURT: Good morning. Did you file a motion to waive presence?

MR. WEISS: I did not.

1 THE COURT: Okay. In this district, we generally do
2 this. I will let you get away with it this time, but the next
3 time, you need to make sure you file the motion, okay?

4 MR. WEISS: Thank you.

5 THE COURT: Thank you.

6 MR. PICCARRETA: Judge, Mike Piccarreta on behalf of
7 Andrew Padilla, and I similarly waived his presence, and we did
8 not file a motion. I read the rule and saw it was not a
9 mandatory appearance.

10 THE COURT: It's mandatory here. You need to file a
11 motion, okay?

12 MR. PICCARRETA: We will in the future.

13 THE COURT: Perfect.

14 Good morning to everyone. I have the status hearing.

15 MR. KIMERER: Your Honor, excuse me.

16 THE COURT: Oh, I am sorry.

17 MR. KIMERER: Michael Kimerer appearing on behalf of
18 Jed Brunst. Also --

19 THE COURT: We need to speak in microphones. If you
20 will step forward, please.

21 MR. KIMERER: Yes. Michael Kimerer, and Gopi -- I
22 always have difficulty with Gopi's last name. We are appearing
23 on behalf of Jed Brunst, and Jed Brunst is present at this
24 time.

25 THE COURT: Sir, how do you pronounce your last name?

1 MR. PANCHAPAKESAN: Gopi Panchapakesan, Your Honor.

2 THE COURT: Good morning to you two as well.

3 Is there anyone else?

4 This is time set for the status hearing. This Court
5 is in receipt of Document Number 443, which is the defendants'
6 joint status report. I have Document Number 444, which is the
7 status memorandum from the United States Government, and I have
8 Document Number 446, which is the United States' response to
9 the defendants' joint status report, which is Document Number
10 44 -- I'm sorry, which is document number 446.

11 Mr. Stone or Mr. Rapp or Mr. Kucera or Mr. Jones,
12 what's the status of discovery in this case?

13 MR. JONES: Reggie Jones on behalf of the United
14 States, Your Honor. If I may approach?

15 THE COURT: Go ahead.

16 MR. JONES: If it is okay with Your Honor, the
17 government would like to start off by addressing some of the
18 issues as it pertains to the scheduling order and the discovery
19 in the case historically, Your Honor.

20 The United States has complied fully with the
21 scheduling order as it pertains to discovery, Your Honor. And
22 as it's the defendants' contention that we have just dumped ten
23 million documents on them, Your Honor, it's just not the case.

24 To start, Your Honor, the government produced more
25 than seven million documents to the defendants in an agreed

1 industry-wide standard format, Your Honor. We were all here in
2 court in April 2018. We all agreed upon, and the Court adopted
3 --

4 THE COURT: You know what, Mr. Jones, everything that
5 you have to tell me this morning is incredibly important, and I
6 want to make sure I can take some notes, so if you could slow
7 down, it would be helpful.

8 MR. JONES: Will do, Your Honor. Thank you.

9 In an agreed-upon format, we were all here in April
10 2018, and the Court adopted its scheduling order.

11 The government, in May of 2018, produced to defendants
12 these seven million documents, Your Honor. Not only did we
13 produce to the defendants these seven million documents more
14 than 20 months prior to trial, we also produced indexes, Your
15 Honor, consisting of more than 25 categories denoting the
16 source from which these materials were obtained, Your Honor.

17 THE COURT: Okay. One -- just one minute. My
18 apologies for interrupting you, Mr. Jones.

19 I need -- Mr. Feder, has the index been helpful?

20 MR. FEDER: No, Your Honor, because --

21 THE COURT: Why not?

22 MR. FEDER: Because it's in a program called
23 "Relativity," which the defense attorneys then need to buy.
24 Seven million documents, it is difficult to go through them. I
25 can give the Court a great example, because it involves the

1 Brady obligations of the government, which the government I
2 think at our last hearing indicated that they didn't have any
3 Brady to produce.

4 My secretary was trying to go through the discovery
5 from the government last week and came across what we would
6 call attaboy -- 30 pages of attaboy emails from various law
7 enforcement agents all over the country sent to Backpage
8 congratulating them on their cooperation in helping to send
9 them ads of what were suspected to be child prostitution ads.
10 Those were not produced.

11 The government represented to this Court that they
12 didn't have any Brady to produce, and it was not under any
13 particular label in the government's production of discovery.
14 That's one example.

15 THE COURT: Is there any defense counsel that is
16 currently here that has found the index that the United States
17 Government has provided to you to be helpful? That's a
18 negative response from everyone.

19 Mr. Jones, my apologies for interrupting. Go ahead.

20 MR. JONES: Your Honor, in addition to the indexes,
21 Your Honor, we have offered to defendants a DOJ Relativity
22 support specialist to assist them in navigating these
23 documents, Your Honor.

24 And as a matter of fact, we have --

25 THE COURT: Is this person still in -- is the person

1 working? I know none of the AUSAs -- none of you all are being
2 paid right now, so is that person working?

3 MR. JONES: That's right, Your Honor.

4 And as a matter of fact, we were on a two-hour
5 conference call with the defense at the outset of this case,
6 Your Honor, with two DOJ support specialists, Your Honor,
7 walking them through facilitating their review of the documents
8 and offered to do this whenever it was needed, Your Honor.

9 In addition to this, Your Honor, approximately seven
10 months ago in July of 2018, we produced more than 1,000 pages
11 of hot documents, i.e., documents specifically related to the
12 allegations contained in the superceding indictment. We gave
13 these to defense counsel, Your Honor.

14 We supplemented this hot document production in
15 September with an additional 400 pages of hot documents.
16 Documents, like I say, Your Honor, that the government feels is
17 most important to its case and/or related to the documents --
18 the indictment.

19 We even took this a step further, Your Honor. Based
20 on several of these defense counsel's requests, we segregated
21 these hot documents and tailored them to each respective
22 defendant, Your Honor, and have offered to and have on occasion
23 met with defense counsel and participated in conference calls
24 to discuss their clients' exposure and also the details of
25 these documents with the defendants and have offered to do this

1 for all of them, Your Honor, as it pertains to these 1500
2 documents.

3 Another point, Your Honor, that I think is very
4 important to address today is that of these seven million
5 documents, more than two million pages of these documents, Your
6 Honor, are actually just reproductions.

7 These are documents that Backpage provided to the
8 Senate during its investigation of Backpage and to the
9 government as part of the Arizona Grand Jury investigation
10 where the Court required them to provide these documents to us,
11 Your Honor.

12 THE COURT: So your argument is that the two million
13 pages they should be very, very familiar with, at this point.

14 MR. JONES: That's correct, Your Honor.

15 One other point I wanted to address, Your Honor, is
16 that more than half of its discovery, more than five million
17 documents come from a source entitled "Costar materials," Your
18 Honor.

19 THE COURT: Whoever has a phone going off, if you can
20 please silence your phone, that would be very helpful.

21 My apologies again, Mr. Jones. You have been
22 interrupted several times, sir. Go ahead.

23 MR. JONES: That's okay.

24 They come from a source called the Costar materials,
25 about five million documents. And we understood, Your Honor,

1 that's very voluminous; five million is a lot of documents. So
2 we said, okay, we will agree to provide the defense counsel
3 with any documents from this source that we intend or might
4 utilize at trial, and we did so, Your Honor, in August of 2018.

5 So as you can see, Your Honor, the United States has
6 been very forthcoming, unusually forthcoming when it comes to
7 discovery in this case, so it is very surprising when we saw
8 the defendants' status conference memo that they -- let me make
9 sure I get this right -- that they are unable to make any
10 meaningful review of these documents, Your Honor.

11 That really surprised us, given the efforts that we
12 have come in trying to release these documents to the
13 defendants.

14 And just doing a bit of comparing and contrasting,
15 Your Honor, the Enron federal case, which is the case we all
16 know out of Texas, and that case was a lot more massive than
17 our case. It contained hundreds of millions of documents in
18 that case. Your Honor, the defendants were indicted in that
19 case in February 2004, the CEO of Enron and codefendants,
20 superceded in July of that year.

21 Your Honor, that trial -- trial commenced in that case
22 in January of 2006, approximately 23 months post indictment, a
23 case with hundreds of millions of documents, Your Honor. A
24 case where the government --

25 THE COURT: Were all the defendants' assets seized by

1 the government in that case?

2 MR. RAPP: Yes.

3 MR. JONES: Yes, that is correct, Your Honor.

4 And with that case, Your Honor, just in comparing and
5 contrasting discovery in that case, Your Honor, defense were
6 given servers in that case detailing email accounts of over 500
7 employees, they were given 1500 CDs in that case, 70 hard
8 drives, and 1500 boxes of paper documents in that case. And
9 that case still proceeded to trial 23 months post indictment.

10 THE COURT: Did they have prosecutions in different
11 jurisdictions?

12 MR. JONES: Correct, Your Honor. That's correct.

13 Defendants in this case have got no paper documents.
14 Everything that we have given them has been in the industry
15 standard format that they all agreed to -- we all agreed to in
16 April of 2018, that they would be provided in.

17 We have provided them indexes, Your Honor, and we're
18 still, Your Honor, 21 months post indictment. So just
19 comparing and contrasting this case with theirs.

20 One other point I wanted to make, Your Honor, in
21 regards to the Enron case is, in regard to Jencks materials,
22 Your Honor. As the scheduling order sets out, the government's
23 agreed to provide the defendants with Jencks material
24 approximately 11 months before trial.

25 As Your Honor is aware, in most federal cases

1 defendants aren't given Jencks materials until after a witness
2 has testified at trial. We are giving it to them 11 months
3 before trial.

4 And in the Enron case, the judge didn't order Jencks
5 materials to be turned over until 30 days before trial, Your
6 Honor. We are giving them to them 11 months.

7 One final point, Your Honor, is that witness
8 statements, as well as an exhibit list, we agreed to turn this
9 over, detailed witness statements and exhibit list,
10 approximately nine months before trial.

11 So, you know, the United States admits that we have
12 bent over backwards, Your Honor, to make this as seamless a
13 process as we can in complying with our discovery obligations
14 here.

15 THE COURT: Well, Mr. Jones, I know on the scheduling
16 order that has been approved by this Court, Document Number
17 131, the initial compliance with Rule 16 discovery is set
18 for -- the expert disclosure requirements was due the 3rd of
19 December, 2018. Percentage-wise, how much discovery has been
20 given to the defense? How much was given by the 3rd of
21 December of 2018?

22 MR. JONES: I think --

23 THE COURT: You can confer with your colleagues if you
24 need to. Percentage-wise.

25 MR. JONES: I would like to address --

1 THE COURT: Mr. Rapp, if you need to move up to the
2 lectern, you can. Come on up. If you are the resident expert
3 on that question, answer it.

4 MR. JONES: Your Honor, we were just conferring
5 about -- there are a couple of outstanding areas, but let me
6 answer -- to answer your question, first, other than these two
7 outstanding areas that I am about to address, more than 90
8 percent of the discovery has been given to defendants to date.

9 THE COURT: And that was by the 3rd of December, 2018?

10 MR. JONES: That's correct, Your Honor. I would like
11 to address the filter review and also the servers, Your Honor.

12 As Your Honor knows, you approved a filter protocol a
13 couple of days ago, and so we had ceased, you know --

14 MR. RAPP: -- review.

15 MR. JONES: -- review of some of our documents, you
16 know, as per defendants' request in May of 2018.

17 Now that our filter protocol has been reviewed, we
18 have a few categories, documents, i.e., the defendants' tax
19 records, third-party IT firm, Your Honor, and also some of the
20 personal devices that need to go through that attorney filter
21 review. But those documents should be disseminated to them as
22 well within the next couple of months or so since the filter
23 protocol is in place.

24 One other besides that filter review, Your Honor, we
25 also seized a large amount of servers in this case; to be

1 specific, Your Honor, more than 70 servers were seized in this
2 case.

3 Five of these servers, Your Honor, were seized in
4 Dallas, and they contain, you know, paper processing data, as
5 well as, you know, some of the email data. The email data
6 would be sent through our filter protocol and be given to them
7 shortly.

8 This paper processing data is currently in the
9 possession of FBI. Defense has requested, you know, review of
10 this paper processing data, and FBI is currently imaging those
11 servers, and that should be available to them shortly as well,
12 Your Honor.

13 One other point regarding the servers is that we
14 seized also about 40 servers in Amsterdam, and because of, you
15 know, how slow sometimes the MLAT process can be -- but we have
16 obtained about nine of those servers, which we believe, to the
17 best of our knowledge, contain all the totality of the
18 marketplace data, Your Honor. So all of the ads, both
19 internationally and domestically, are contained on those
20 servers.

21 And although we -- defense asked specifically for, you
22 know, to be able to access the ads, as well as the paper
23 processing data, Your Honor. And so the ad data is at a FBI
24 facility here in Phoenix now and available for them. Whenever
25 they would like to, we can work with the technical folks to set

1 up a time for them to review any of the server -- ad
2 information on the servers, Your Honor.

3 Although I would like to point out that this isn't new
4 information, Your Honor. These are ads that were on, you know,
5 Backpage for the past 14 years. They were classified ads on
6 their site, so these are just millions and millions of ads that
7 they have seen for the past 14 years, ads that they have turned
8 over to the Senate, ads that they have turned over to us as
9 part of the grand jury proceedings compliance.

10 THE COURT: Mr. Jones, is that part of the 10 percent
11 that's currently outstanding?

12 MR. JONES: No, not the -- well, not -- if you didn't
13 count the server information, Your Honor, we probably would say
14 that probably 95 or so percent of the discovery has been turned
15 over. Because I didn't count that server with that discovery,
16 but, I mean, those are the only two outstanding categories as
17 it pertains to discovery.

18 But as far as the ads, Your Honor, like that ad
19 information, like we said, is not new. This is information
20 that we detailed in the superceding indictment, emailed ads
21 that have been detailed in a lot of civil suits.

22 How they plan to use millions and millions of these
23 ads or what they would need with them, we don't know, Your
24 Honor, but they asked for them, and we said, hey, you can look
25 at them, you know.

1 Paper processing data, you know, same thing, Your
2 Honor. We will have that available for them, their technical
3 folks to use as they would like. And we are able to -- if they
4 would like for us to help facilitate any of that, you know, to
5 make it less of a burden off of them, we are happy to help them
6 if they are looking for specific stuff as well. So if they
7 want to work with us on that, we are more than willing to work
8 with them as well, Your Honor.

9 THE COURT: Mr. Jones, thank you for all of that.

10 Mr. Rapp, is there anything that you would like to add
11 to that, sir?

12 MR. RAPP: Well, just on the servers. We sent the
13 defense a letter on December 10th. It's actually Exhibit J to
14 our Document 444, basically laying out the posture of those
15 servers.

16 To date we have not received a response from the
17 defense, but I just want to drive home the point on those
18 servers. These are millions and millions of ad postings. I
19 have a random sample of one. It's nothing more than an
20 explicit ad with explicit pictures and explicit text that is
21 consistent with the postings on Backpage. There's just
22 millions of those.

23 And so I don't -- I don't want the defense to say,
24 well, look, we want to go through every one of those servers
25 because somewhere buried in there is something that might be

1 helpful, when those servers contain nothing but international
2 postings.

3 As the Court knows from some of the filings, Backpage
4 had a presence in 94 countries in addition to the United
5 States, and the postings in all of those countries outside of
6 the United States, there was no moderation, so they are nothing
7 more than very explicit ads. There's no pretext to
8 prostitution. There's no removing certain terms and then
9 reposting the ad.

10 So I just want the Court to make clear, because when
11 you are presented with numerous servers, you might think, oh,
12 geez, we have to go through all of those. Not really. They
13 are just nothing more than postings. That's the only point I
14 wanted to make.

15 Thank you.

16 THE COURT: Thank you. Thank you to both of you.

17 The defendants' joint status report, which is Document
18 Number 443, Mr. Piccarreta, it has your name at the top of it.
19 Is it fair to say that you are the author of this document and
20 everyone else joined in?

21 MR. PICCARRETA: I am the co-author, but I will take
22 responsibility as the main author.

23 THE COURT: Okay. I have read through the document
24 obviously several times, and it's the defendants' request. It
25 is a joint status report, but it appears to be a veiled motion

1 to continue. Is that what you actually meant by this document?

2 MR. PICCARRETA: Well, in part. What I meant is --

3 THE COURT: Is that the relief you are seeking? You
4 are asking for four additional months, so --

5 MR. PICCARRETA: Yes.

6 THE COURT: That is usually granted by way of a
7 motion, once the motion is filed.

8 MR. PICCARRETA: Well, I thought I had an obligation
9 to bring to the Court's attention now the problems that are
10 erupting in the case that may impact the scheduling process.

11 I wanted to A, make a complete record on that, but
12 two, I wanted to let the Court know the difficulties with the
13 scheduling process.

14 In the status report though, I did suggest that at
15 least for now to stay the defense obligations for 120 days as
16 we try and move through the financial issues so that we can
17 keep things somewhat in a status quo before we have to --
18 perhaps have to deal with Fifth and Sixth Amendment issues,
19 motions to dismiss, Stein inquiries by the Court, and perhaps
20 motions to withdraw by counsel.

21 So that was my and our suggestion that we would be in
22 a better position over 120 days if -- to be able to get some
23 answers as to financially what's going on with the case. And
24 so, yes, it is a motion, but -- not formally, but I did want to
25 let the Court know of all of these difficulties.

1 THE COURT: Well, it is actually not a motion, it is a
2 request for a status hearing. If you were filing a motion for
3 relief, you should have filed it as a motion.

4 But what I will do to help out the defense, I will
5 accept it this one time as a motion requesting certain relief.
6 And I believe you are requesting a motion to stay the defense
7 obligations; is that correct? That's what you just said?

8 MR. PICCARRETA: Yes.

9 THE COURT: Go ahead.

10 MR. PICCARRETA: Now, Judge, I think you have to look
11 a little bit to the history that might help you understand why
12 we are very, very concerned about the process of this case and
13 the handling of the case.

14 As you know, the indictment occurred in March of 2018.
15 Counsel -- clients were arrested, counsel made appearances at
16 that time --

17 THE COURT: Mr. Piccarreta, my apologies for
18 interrupting you, and of course I will allow you to finish your
19 thoughts and I appreciate all of your thoughts, but I have a
20 question before you finish.

21 I have Document Number 131, which is filed the 2nd of
22 May, 2018 and it is the scheduling order. Isn't it true that
23 this was a document that was presented to the Court as a joint
24 defense prosecution document?

25 MR. PICCARRETA: Yes, it was.

1 THE COURT: So all of the relief that you are
2 requesting right now, what's changed since May that would lead
3 me to believe that the flow of the case has changed such that I
4 need to change the ultimate scheduling and the trial that is
5 scheduled for, I believe, the 15th of January, 2020 at 9:00 in
6 the morning?

7 MR. PICCARRETA: Well, initially, first, the
8 disclosure issues, the volume of disclosure has been presented,
9 as they have indicated.

10 THE COURT: But this is something the United States
11 Government had proffered to the defense as it relates to the
12 millions of documents that would be coming your way, right?

13 MR. PICCARRETA: Yes.

14 THE COURT: Go ahead.

15 MR. PICCARRETA: And all of those documents, as they
16 indicated here, have not yet come our way.

17 THE COURT: Just 95 percent.

18 MR. PICCARRETA: Well, 95 percent, but if you include
19 the computers they just talked about, then that percentage
20 drops down to, they can estimate, 10 percent, 20 percent.

21 THE COURT: But wouldn't you also be able to argue
22 that if you are requesting information from computers, and
23 Mr. Rapp and Mr. Jones placed on the record, that those issues
24 are dealing with ads that are born from the companies that you
25 represent, right? So this is information that you at some

1 point already possessed over a decade-and-a-half period of
2 time, right?

3 MR. PICCARRETA: Well, I don't represent the company.
4 I represent --

5 THE COURT: Well, you are here talking for the defense
6 counsels. Obviously I will let all of you talk to me, but just
7 globally, that's a question that I think you can answer.

8 MR. PICCARRETA: Well, I am not familiar with those --
9 with those documents.

10 THE COURT: Who is familiar with those documents that
11 Mr. Jones and Mr. Rapp just proffered on the record? Is
12 anybody? Has anybody heard of a Backpage ad?

13 Is anybody familiar with Backpage, with what they do
14 as it relates to ads? Would anyone argue that if Backpage is
15 responsible for receiving compensation to post an ad, Backpage
16 should know about the ad? Would everyone agree with that?

17 MR. PICCARRETA: Well, I guess it depends on what we
18 are talking about "know." Ads are posted. Different people
19 know different things. Different people have different roles.
20 Different people were involved in the case.

21 I speak on Mr. Padilla, but what's the big thing
22 that's changed, when we entered into this agreement, funds were
23 advanced to represent Mr. Padilla. No mention was made that
24 the government intended to seize the IOLTA accounts of the
25 funds earmarked for Mr. Padilla when we entered into that

1 order.

2 After we entered the order and after the Court entered
3 the order, the government for the first time brought it up to
4 me. We had a very open, pleasant discussion. They wanted some
5 information. I gave it to them.

6 They sent me a letter saying, we are concerned. I
7 sent them a letter saying, your concerns are misguided, and
8 then radio silence. So I assume that the issue is done.

9 In the interim though, I detected -- all of a sudden
10 there's a motion to disqualify our First Amendment counsel.
11 There's a seizure of the First Amendment counsel's trust
12 accounts, but nothing for us.

13 We have a hearing. Their motion is denied to get rid
14 of our counsel. Some rulings go each way. I then follow up
15 with some specific Brady requests after the hearing, and I have
16 to admit, I was -- I had been active in the case.

17 Then all of a sudden, unbeknownst to us, on Halloween,
18 they go out and get a seizure warrant, albeit it for the wrong
19 accounts, in my case, I am only speaking for Mr. Padilla --

20 THE COURT: You think they picked Halloween for a
21 reason?

22 MR. PICCARRETA: No, I just thought it was ironic. I
23 think it's interesting. I am not saying they planned it for
24 Halloween. They don't tell us for about another week, and then
25 we get a phone call in November.

1 Now, we find out on November 7th, which is, by the
2 way, months after initial appearance. You look in cases where
3 there's other seizures, the landmark cases, things are dealt
4 with right up front before the lawyers get involved. They know
5 what's going on. Here, we are involved. We have our plans.
6 We have cost limitations, but we are doing the best we can.

7 We, at the beginning of the case, we are dealing with
8 a wide variety of collateral non-motions on the merits. Get
9 rid of counsel, technical things, joint defense agreements,
10 call-back motions, things like that, not really the heart of
11 the case.

12 We -- then since November 7th, we have been mostly
13 full-time and trying to get our money back. And we came here,
14 and the Court ordered denied here. We went to L.A. It is
15 filed before the magistrate. That ruling is pending on that.

16 Prior to that, the original seizure warrants that
17 happened before the case began, which did not involve IOLTA
18 funds, is that we -- is up for those warrants pending before
19 the Ninth Circuit, and as of yesterday, the Ninth Circuit is
20 going to hear the case.

21 I am not in the business of predicting how they will
22 rule, but they -- the briefing schedule is accelerated. They
23 put it on the accelerated oral argument calendar. The briefing
24 ends in March, so that figures into within the 120-day window
25 that if we prevail and get some relief there, then we can get

1 our money back.

2 We have money, it's just that they have it. And then
3 for my thing, we have been working with them on the issues of
4 IOLTA funds, virtually it has been the focus of the defense for
5 the last two months. All this takes us away from being able to
6 do it. That's assuming, which is an assumption --

7 THE COURT: So you're making an argument that the bulk
8 of the time has been spent on making sure the lawyers can
9 secure money so that you can be properly compensated for doing
10 your job as it relates to getting through the discovery and
11 preparing your respective clients for trial.

12 MR. PICCARRETA: Yes. And I view it as we are
13 defending our clients' ability to have "counsel of choice" is
14 the term that the courts seem to use. And in order to enforce
15 our clients' Fifth and Sixth Amendment rights, which then
16 spills over to here, and why I asked the Court to have a status
17 conference now as opposed to April, because I did not want to
18 show up in April and lay all this on the Court and the Court
19 could rightfully ask, where have you been for three months?
20 How come this is the first time I am hearing about it?

21 So they have taken our money. There is a veiled
22 threat that the monies -- well, my money actually is still in
23 my IOLTA account with my agreement not to touch it pending
24 order of the court or agreement of the government. They have
25 said --

1 THE COURT: When you say, "your money," what are you
2 referring to?

3 MR. PICCARRETA: My client's money, Mr. Padilla's
4 money, for the case. I call it "my money" because eventually
5 it will be.

6 THE COURT: Your money?

7 MR. PICCARRETA: Our money, but it is Mr. Padilla's
8 money.

9 We have been told not to touch it up through November
10 30th, and they did agree we could get paid firm fees up through
11 November 30th.

12 So we -- just like -- we have a shutdown, and we have
13 a shutdown, and I am speaking for Mr. Padilla, and the same
14 thing for Joye Vaught, where we cannot access their money to
15 pay us at this time. So we have no funds.

16 Then on top of that, if you talk about the cost of
17 putting this disclosure into the proper programs as we have
18 talked about, these are thousands and thousands, as put in the
19 motion, truckloads if they were paper, of documents.

20 We do not have the funds to do it on Relativity. We
21 will have the funds if we prevail in the Ninth Circuit for the
22 first group of warrants and prevail in the court in California.
23 And by the way, it wasn't our decision to have two courts
24 running back and forth over the West Coast.

25 The government made their strategic decision to file

1 the forfeiture warrants in California, and we are here now, but
2 now we are dealing with two things. So our money is
3 effectively frozen.

4 We have cases pending for some individual warrants
5 that, if we are successful, will be beneficial, and we are
6 stuck in a position that normally, if we didn't have those
7 pending things, I would have to ask the Court to hold a Stein
8 hearing to determine whether the government's tactics have
9 forced out counsel of choice, and if so, what would be the
10 remedy. And if that was unsuccessful, we would properly have
11 to ask the Court to withdraw, which is not my client's desire.

12 The government has suggested, well, just get
13 appointed, and I really don't -- I have learned when I was a
14 lawyer after about a week, I don't take legal advice to solve a
15 problem that was caused by the person who is giving me the
16 legal advice.

17 So, you know, our clients are not interested in us
18 being appointed at a reduced rate, and we are from out of town,
19 so that doesn't solve the issue. But rather than deal with
20 that now and go to the Court and file the motion to dismiss, or
21 alternatively motion to withdraw, I thought, let's put our role
22 on hiatus, come back to the Court at your status conference
23 currently set in April and let you know what's going on.

24 But it's a really serious Fifth and Sixth Amendment
25 issue. We have no funds. And the government says, well, tell

1 your client to pay you. Well, there probably isn't a client in
2 the city -- very few clients could afford what's needed to do
3 this case. And the Court has got a taste of the disclosure in
4 the millions of documents, but apart from that, there's the
5 serious First Amendment constitutional issues that we disagree
6 on.

7 On the seizure of the assets, we believe they have not
8 complied with the law on seizing it. They believe they have.
9 We disagree. Those are complex legal issues that we are having
10 to deal with at the same time trying to manage the case.

11 And once they take the funds, Mr. Padilla cannot
12 manage the case. And we have remedies, you know, if things
13 fail and those other California things where we are now, we
14 can't come to the Court and request a Luis hearing, the Supreme
15 Court Luis, and have discussions there.

16 But I thought rather than have significant
17 constitutional issues here relating to the monies that have
18 been taken there, that we should at least try to resolve them.

19 If we are successful, a lot of these problems go away.
20 We still may need more time because we are sort of frozen now,
21 but -- and if they don't go away there, then we are going to
22 have to make decisions how do we address the Court and what
23 type of hearings have to be necessary and what type of
24 disclosure we are going to request from the government on the
25 issue of this.

1 But, you know, I -- we have all been involved in the
2 criminal justice system here for a long time. On our side of
3 the table, the Court, and I have never had this happen in all
4 of my cases, and I have queried other people in the white
5 collar law, and they sort of haven't heard it either.

6 What makes this unique, and what makes this case have
7 issues that would be of interest to a lot of courts, is that
8 seizing IOLTA funds in the middle of the proceedings, and then
9 coming to court and saying, don't give them a continuance, I
10 mean, it benefits -- they are in a no-lose situation.

11 They cut off the money. They -- defendants can't have
12 counsel of choice or are severely hampered, then push the Court
13 to go, keep that time limit going, keep that time limit going.
14 And that gains them, and whether it is intentional or not, I am
15 not throwing aspersions at anyone, but it gives them huge
16 tactical advantage, and that's the result.

17 And it's just like in a battle, if you cut off your
18 munitions, you get rid of the defense lawyers, you cut off the
19 money to pay them, that increases your likelihood of getting
20 the result you want. It decreases the likelihood of a fair
21 trial for defendants and a fair decision on really serious
22 constitutional issues.

23 THE COURT: So you are making an argument now that the
24 CJA panel and the Federal Public Defender is not capable of
25 taking on a defense of this magnitude?

1 MR. PICCARRETA: No, no, I think they are capable of
2 it, but under the constitutional case law, Mr. Padilla has a
3 right to a counsel of choice. And it is not an unlimited
4 right, I understand that. But his counsel of choice, for
5 better or worse, is me.

6 If due to circumstances created by the government's
7 seizures, if he cannot have his counsel of choice, he
8 understands whatever the rules are and if we can get the
9 Federal Public Defender or adequate CJA counsel, that's what
10 you get, and then the issue bubbles up for, you know, for a
11 later day.

12 But I am saying, if we can keep sort of a status quo
13 until the next status conference, we may have information
14 before we have to delve off into litigating Fifth and Sixth
15 Amendment issues and issues of seizing the funds for capital
16 advantage.

17 THE COURT: Now, when you say, "keep the status quo,"
18 is it fair to say that since you are making an argument that
19 all of the defense counsels are similarly situated as it
20 relates to the compensation, is it fair to say that they are
21 all in stand-by mode as it relates to preparing the case
22 because they are also waiting to see ultimately if they will
23 get paid?

24 MR. PICCARRETA: Well, I can't speak for everyone, but
25 I think for the most part the Court is correct. I know I am.

1 THE COURT: So the discovery, the 95 percent, no one
2 is doing any work on it because you want to make sure that at
3 some point in time you are receiving pay?

4 MR. PICCARRETA: Well, we're doing what we have to do.
5 Our attention has been totally on --

6 THE COURT: Getting your money.

7 MR. PICCARRETA: Yeah, getting the money to be able to
8 do the work, but we are not -- you know, until we are out of
9 the case, we are not going to be derelict, but there's only so
10 much time, in my case, a small firm can devote and especially
11 if you are not getting paid, then you have got to handle some
12 other matters so everyone gets food on the table.

13 But I am not crying the blues for me. This is not
14 about me. I am willing to ride this out to see whether our
15 money can be returned to us and continue on, because I do want
16 to stay.

17 But on the other hand, it is grossly unfair to
18 Mr. Padilla when the government seizes his money to then not
19 have a lawyer that can be compensated to handle his case.

20 And so I would urge the Court to just put this on
21 hold, at least our obligations on hold, set a status conference
22 in April, I think there's one set, and then we come to the
23 court and let the Court know where we are.

24 And in the interim, I can't guarantee when courts
25 rule, but the Ninth Circuit has set an accelerated schedule on

1 the issues for those warrants. The magistrate has some
2 pleadings in front of her now.

3 So that's where -- that's my recommendation to the
4 Court. That's why I asked for a status conference, and we are
5 just trying to enforce counsel of choice and to avoid having to
6 deal with a very -- a really serious constitutional issue.
7 Because this case is unlike some of the other cases that have
8 made it to the Supreme Court.

9 So I would urge the Court to do that. And, look, we
10 didn't create the problem. We were plugging away as best we
11 could, but once the IOLTA seizures arrived, that was, at least
12 seven months post indictment, to me sort of a bridge too far.
13 And it was nothing that I expected to occur, and I was very
14 surprised, especially in this type of case that it would occur.

15 So I would urge the Court to not -- I don't want to
16 use the word "punish," but it would put us, the defense, in a
17 very, very bad position as a result of actions taken by the
18 government that have hindered the defense, to then say, no,
19 your discovery is due then, your discovery is due now.

20 Because those circumstances all changed on Halloween
21 night and then Halloween day, and then a week later when we
22 received notice of it, at least from Mr. Padilla's and
23 Ms. Vaught's point of view.

24 THE COURT: Well, sir, I certainly appreciate you
25 placing all of that on the record. Which defense counsel is

1 next? And I know all of you, but for the record, when you
2 approach the lectern, if you could place your name on the
3 record, please.

4 MR. WEISS: Yes, Your Honor. Steve Weiss on behalf of
5 Joye Vaught, and I am not going to spend a lot of time talking
6 about her situation other -- I agree with the remarks that
7 Mr. Piccarreta just made. Because my client, Joye Vaught, is
8 in essentially in the same situation as Mr. Padilla.

9 But I just wanted to add a few things to sort of feel
10 out the situation. My trust account -- I hold money in my
11 trust account for the benefit of defending Joye Vaught, but it
12 is effectively frozen.

13 And it is frozen because I was told in so many words
14 that even though the forfeiture warrant for my IOLTA account
15 expired, it was likely they were going to refile that.

16 And then on top of that, when we argued the case in
17 California, several weeks ago, because this Court declined to
18 rule on that matter and said we should be in California, we
19 said okay, that's what the Court said to do, and that's where
20 we went.

21 During the course of that hearing that took about
22 three hours, counsel for the government would not rule out a
23 criminal prosecution of attorneys who then sought to reach into
24 those trust funds to pay for work that was done. So as a
25 result of that, I haven't touched those funds.

1 THE COURT: You are certainly not saying that a
2 federal prosecutor threatened prosecution?

3 MR. WEISS: I will tell you that Mr. Feder has the
4 actual transcript of the remarks and you can interpret that how
5 ever you wish. I will tell you how I interpreted it, as if I
6 decided that notwithstanding the fact that a warrant had
7 expired --

8 THE COURT: Well, tell me how you received it.

9 MR. WEISS: Well, I received it as a threat, that
10 there could be a criminal prosecution.

11 THE COURT: From which lawyer?

12 MR. WEISS: It was Mr. Kucera.

13 So in any event -- so I am in the state of limbo in
14 that situation. In the government's reply to our status memo,
15 they talked about having not shown that our clients can't
16 afford to pay for this defense.

17 And this is an enormous case. I don't know who really
18 could, but Joye Vaught cannot. And Joye Vaught has no money to
19 defend this case.

20 I offered, when we were here arguing the motion some
21 time ago, at that point I offered to provide to the Court under
22 seal her financial affidavit, but the Court declined to take
23 the case and sent us effectively to California. But I still
24 have that, and I still will file it with the court, if the
25 Court permits it to be filed under seal.

1 And the government, in so many words, kind of knows
2 that she can't afford counsel of choice, which is her Sixth
3 Amendment right because they either have the Pretrial Services
4 Report or they have access to it.

5 And to just summarize it, it shows that she has a
6 negative net worth. So -- and she has no other sources of
7 funds. Her parents are deceased. Her only so-called friend is
8 her boyfriend, who can't afford to pay for this.

9 And so the bottom line is that I just want the Court
10 to know that my client is in the position of being unable to
11 afford, and hopefully, will get some relief from the California
12 courts where this Court said we should properly be, and that's
13 where we are.

14 And it is in the Ninth Circuit. We anticipate
15 hopefully a favorable ruling, but certainly a ruling that will
16 let us know where we are within the next several months.

17 So I don't think the request that you are considering
18 to be a request for a continuance is unreasonable. I think
19 that it should be granted. Thank you.

20 THE COURT: Thank you very much.

21 Next.

22 MR. CAMBRIA: Good morning, Your Honor. Paul Cambria
23 on behalf of Mr. Lacey.

24 I wanted to address one issue that you brought up this
25 morning, and that was a situation of, well, the company

1 supplied the documents so there is the indication there that
2 now which of those documents would be charged to our side?

3 Rule 16 obviously has been enacted to educate the
4 lawyers as to the discovery. We are not employees of that
5 company. And we need to use Rule 16 to obtain the information
6 and allow ourselves to be educated.

7 There may be some people who are employed by that
8 company who have knowledge of those documents, but we don't
9 unless we are given the documents and we have enough time to
10 evaluate them and decide whether or not they are useful.

11 And, you know, the point that Mr. Rapp makes about,
12 well, they are all the same. Well, they are all the same to
13 him. They may not be to us.

14 In addition he says, well, some of them deal with
15 events overseas and there's no moderation at all, et cetera, or
16 there's no crime committed overseas, and a number of places the
17 laws are different and so the ads are different.

18 But the bottom line is that we still have to make
19 ourselves aware of the contents of these documents. That's
20 what Rule 16 is all about.

21 As far as funding, I have no funds. I haven't had any
22 funds in months and months and months. I am not sitting there.
23 I am still working hard on behalf of my client. That's just
24 the way I am, and I am sure these other lawyers are as well.

25 However, the situation is such, originally we had made

1 an application, as you know, to try to free up the funds. The
2 government's side is fully funded, obviously. They are all
3 being paid. They have whatever funds they need for discovery.

4 THE COURT: In theory they are fully funded, but they
5 are receiving nothing for the last month.

6 MR. CAMBRIA: Well, what I am saying is, they are
7 being paid. They have expense money and everything that they
8 need in order to do their side of the case clearly.

9 THE COURT: But you are aware the federal government
10 is shut down and they are receiving no pay.

11 MR. CAMBRIA: I am. And I would venture to guess that
12 that will be a shorter period of time than it will be for the
13 defense to receive funds in this case. And I --

14 THE COURT: So you would agree that the federal
15 prosecutors somewhat feel your pain as well, because they
16 haven't been compensated.

17 MR. CAMBRIA: To a very small degree compared to ours,
18 certainly, and neither side would be -- would like that. I do
19 know one thing, that when the government does start back up in
20 business, they will be fully compensated.

21 We, on the other hand, have made an application, as
22 you know, and as has been repeated here several times this
23 morning to this Court, this Court indicated that we should go
24 to California. We promptly did, and we promptly filed.

25 And several rulings were made. Several things were

1 done by the government to once again freeze those funds. They
2 were successful in freezing them.

3 We have taken an appeal. The Ninth Circuit has
4 indicated at the first level of review that they are going to
5 permit us to brief all of the issues. They are going to
6 schedule it for argument.

7 THE COURT: Mr. Cambria, let me just stop you just for
8 one moment. My apologies for interrupting your thoughts. I
9 will allow you to finish.

10 All of you defense counsel, you have been doing this
11 for decades and decades. I think the junior lawyer in the
12 room, obviously there's a law clerk, but might be
13 Ms. Perlmeter, who is probably an 8 to 10-year lawyer, or
14 Mr. Stone is probably a decade.

15 But on this side, you gentlemen and ladies have been
16 doing it for a long, long time. Is this the type of case that
17 you believe can be done by way of appointment?

18 MR. CAMBRIA: No. One of the reasons would be this,
19 Your Honor, certainly the public defender's office could never
20 take it on, for a number of reasons.

21 Number one, they would have to start at ground zero,
22 and that would cause an even greater delay.

23 Number two, they couldn't survive a conflict analysis.
24 They are all in the same office representing multiple
25 defendants who may have different interests.

1 THE COURT: Well, there would only be one defender;
2 the other ones would be CJA. And in fact, one of your
3 colleagues, the Mitchell Stein Morrissey Carey law firm is, I
4 think they're -- I see Lee Stein's name all over my cover sheet
5 here, and they are obviously white-collar attorneys. And they
6 handle other matters, but they are CJA appointed lawyers.

7 MR. CAMBRIA: But there are a number of us that are
8 not from Arizona. There would be traveling, lodging and all
9 sorts of other things. And it's interesting because the one
10 case that I emphasized in the motion, that basically was denied
11 yesterday, was the Luis case. And I say that for a reason.

12 Luis is a very interesting case because there the
13 Supreme Court said, when funds are available that are not
14 tainted, which we have here, that we should not pour on the
15 public, on the government, on the public defender's office, the
16 charge, when funds are available that are not tainted.

17 And in this case, we have money, and the money is not
18 tainted. And -- however, the money is -- has been seized. So
19 this is different than Monsanto. And they keep talking about
20 Monsanto, Your Honor. Monsanto dealt with the situation where
21 the funds were tainted, clearly.

22 And the difference was that when you have tainted
23 funds, the various statutes that applied in Monsanto gave the
24 government a preference to those funds. Because once there was
25 a conviction, the title to the funds reverted to the government

1 at the time of the commission of the crime.

2 With funds that are not tainted, which we have here,
3 they do not have the same interest. And basically, what I was
4 trying to get at, and I -- I guess I didn't convey the message.

5 When I made the motion with regard to Mr. Lacey, where
6 I said we have untainted funds, they have been mixed up in
7 these accounts as a result of a clerical error, I wasn't in any
8 way attacking the warrants, the seizure warrants. That's why I
9 didn't think that it was inappropriate to be here, because I
10 wasn't attacking the seizure warrants. It wasn't something
11 that the judges in California --

12 THE COURT: Are we going back in time to an issue that
13 has already been litigated here --

14 MR. CAMBRIA: No.

15 THE COURT: -- and not focused on Document Number 443,
16 the status and the request for four additional months?

17 MR. CAMBRIA: But here's the point I am trying to make
18 about that. I think that you could conduct a Luis hearing. In
19 fact, that case says that district courts regularly conduct
20 these taint hearings. And it wouldn't have anything to do with
21 the validity of the warrants issued by Central California. It
22 would simply have to do with a tracing of funds tainted, funds
23 not tainted.

24 Non-tainted funds would be able to finance this
25 defense. So there would be two things going on here. One is,

1 yes, we went to California, we are pursuing it, we are doing it
2 diligently. And if the Ninth Circuit rules in our favor, we
3 will have all of the funds necessary to meet all of the
4 deadlines and have this case move along expeditiously.

5 On the other hand, there is another remedy for
6 non-tainted funds, and that is under Luis. And I believe that
7 this Court could run that hearing. It would have zero to do
8 with reviewing the validity of a warrant on the side of the
9 Central District of California. It would only be a tracing,
10 and that's what that court says. And I was trying to convey
11 that, and obviously I didn't do it effectively.

12 But you could simply go in and --

13 THE COURT: Actually, I thought your arguments were
14 laid out really well, and I thought it was very clear what the
15 position was.

16 MR. CAMBRIA: All right. Well, anyways, so the bottom
17 line here is, Your Honor, that I think Luis stands for that
18 proposition. But it also says, when funds are there and
19 available, that you shouldn't put that on to the public
20 defender's office, et cetera.

21 So we have two things going here. We have a schedule,
22 clearly the Ninth Circuit is expediting this in their way, and
23 it would solve all of the problems.

24 On the other hand, you can try to appoint out-of-state
25 counsel not on your list, all of the rest of that, or the

1 public defenders would have all of the conflicts and so on, it
2 is going to take much more time.

3 The more efficient way is for us to have this brief,
4 and it is relatively brief, hiatus, let the Ninth Circuit rule,
5 and hopefully we will have all of the funds necessary. If not,
6 then we have to deal with what's next.

7 And I think next would be the Luis hearing. Because
8 there are many funds here that are not tainted. Not every
9 dollar that came into Backpage had anything to do with the
10 adult stuff that they are talking about.

11 There were, you know, many millions of dollars
12 generated from other things that had zero to do with their
13 allegation of prostitution.

14 THE COURT: Just one second.

15 Mr. Kucera, do you agree with that last thing that was
16 just placed on the record by Mr. Cambria?

17 MR. KUCERA: The portion about --

18 THE COURT: -- legitimate business outside of adult
19 site issues.

20 MR. KUCERA: I think I can answer, but I will allow my
21 colleague to correct me if I misstate something.

22 THE COURT: Go ahead.

23 MR. RAPP: Go ahead.

24 MR. KUCERA: Your Honor, the vast majority -- the
25 allegations are that the vast majority of the funds that

1 Backpage earned were derived from illicit activities.

2 THE COURT: When you say, "the vast majority," can you
3 give me a percentage?

4 MR. KUCERA: About over 90 is the percent that we have
5 been including, and that is sort of the back of the envelope.
6 We haven't gone through all of the full analysis of every
7 dollar, but that is an extrapolation of that portion that we
8 have analyzed, extrapolated into the whole.

9 But more importantly, the government does not need to
10 prove that every dollar is dirty. The government needs to
11 prove, and the theory of forfeiture and seizure, that all of
12 the funds were involved in money laundering transactions.

13 The magic words in forfeiture hearing -- in money
14 laundering are "involved in." And if we can show that the
15 financial transactions that relate to the Backpage assets that
16 have been seized were involved in money laundering
17 transactions, the government is rightly seeking to forfeit
18 those funds.

19 THE COURT: Well, I'll tell you what, while you are
20 standing, tell me about this threat allegation.

21 Just one moment.

22 I'll tell you what, this is actually a good time to
23 take our morning recess because I want to hear from the other
24 defense counsels.

25 Court's in recess until 10:50.

(Recess taken at 10:34 a.m.; resumes at 10:54 a.m.)

THE COURT: Good morning again, everyone.

This Court will come to order. All parties present when the Court last closed are present again.

Mr. Kucera.

MR. KUCERA: Yes, Your Honor. I think you asked me to address the allegation of threats that the government is supposed to have made at the hearing in the Central District of California.

My suspicion is that that is the very same allegation that was made the last time I was present before Your Honor, where the government was invited to opine on whether it would prosecute any future transaction involving these or any other funds.

And I think I likened it to what would be an advisory opinion by the Court, that the government is not in the business of providing, or the public authority defense under Rule 12, or something akin to that, we are saying giving some sort of speculative answer on whether something would or would not be criminal in some future conduct.

I can't remember my exact words, but I would be surprised if I said anything stronger than that. If that was construed as a threat, I certainly didn't intend it to be.

THE COURT: I appreciate that.

Counsel, did you have anything else to place on the

1 record, or were you finished?

2 MR. CAMBRIA: Just briefly, Your Honor, if I can?

3 The statement by the government that they felt that 90
4 percent of the monies involved would be tainted, I can tell you
5 that the other 10 percent would fully fund the defense in this
6 case. And we obviously have a disagreement as to what --
7 whether or not there's 90 percent involved, but that would be
8 the purpose of the taint hearing.

9 We would in that hearing decide what is and what is
10 not tainted, and the Supreme Court in Luis v. U.S. made it
11 quite clear -- it is kind of interesting, Justice Kagan even
12 kind of hinted to whether Monsanto is even good law anymore.

13 But anyway, the thrust of that case was that assets
14 that aren't tainted are reserved for defense and they should be
15 available. And so I suggest, you know, this is a difficult
16 case. It has lots -- it is difficult for the Court, for the
17 government, for the defense.

18 There are a lot of documents here, a lot of
19 complicated issues, a lot of new issues, things that have never
20 been raised before, prosecution that has never been instituted
21 and successful before, and so we put a lot of work into this
22 case.

23 And we think collectively, Your Honor, that the time
24 we are asking for is the most expeditious way and judicially
25 economic way. Because number one, we are in a place where we

1 were asked to go or told to go. We are pursuing it diligently,
2 and I think we will have a hearing there in fairly reasonable
3 time.

4 And should we be successful, then we will not have any
5 of these issues about visiting huge expenses onto the public
6 and so on. And if we're not, then this Luis v. U.S. hearing,
7 the taint hearing, would be the next thing to happen, before we
8 could then decide counsel in, counsel out, et cetera.

9 I mean, those are really the two stages here, and I
10 think they are reasonable for the Court to go through them and
11 to give us the time necessary.

12 It isn't just a matter of paying the lawyers. I mean,
13 part of our discovery response is, designate expert witnesses.
14 Well, we can't call an expert witness, we have no money to hire
15 them, and try to get them prepared and see if they are
16 interested and all the rest of it, when we are sitting here
17 with all of our money having been seized.

18 So I submit that's a reasonable way for the Court to
19 go to give us this time and to go through these next two
20 stages, the Ninth Circuit, and then after that, if we have to
21 have it after that, Luis. And that's basically our position.

22 THE COURT: I appreciate that. Thank you. And I also
23 appreciate the fact that you placed on the record that despite
24 the financial issues that you are confronted with, your law
25 firm continues to do their job as it relates to preparing for

1 the trial currently set for 15 January 2020. I appreciate
2 that.

3 Who is next, if anyone?

4 MR. FEDER: Bruce Feder for Scott Spear.

5 Judge, the hearing that we had in the Central District
6 before Magistrate Oliver was under seal. My understanding is
7 the government, with permission from the defense, was going to
8 ask that the proceedings be unsealed. I don't know the status
9 of that.

10 But I got the transcript of what Mr. Kucera told the
11 assorted lawyers, many of whom are in here. I would like the
12 Court to read it. Whether or not I need to place it --

13 THE COURT: You talking about the threat issue?

14 MR. FEDER: Yes.

15 THE COURT: Oh, I've already moved past that. I am
16 just prepared to deal with 443, at this point.

17 MR. FEDER: Well, but it pertains to 443, Judge, in
18 this sense. I have been a lawyer for 40 years. I have
19 appeared before this Court. I am going to appear before this
20 Court on Monday on another case. Whatever my reputation is, it
21 is.

22 But I have never had fees threatened by the
23 government, to the credit of this office in Arizona. This is
24 the first time, and I realize the Court knows I have
25 represented people charged with serious drug cases.

1 THE COURT: Well, the reason I ask the question is in
2 almost 30 years, I have never heard of it, and I have
3 certainly, while sitting at that table over there, never even
4 occurred to me to do something like that. That's why I
5 appreciate the fact that Mr. Kucera clarified his position.

6 But go ahead.

7 MR. FEDER: Well, but to get the flavor of what
8 Mr. Kucera said in that courtroom, Judge, and I can tell you
9 every lawyer that was there and every lawyer that was on the
10 phone, took what he said to be a threat.

11 And as you mentioned, Judge, these are all lawyers
12 that have a few years under their belt. All have been around
13 the block. All -- some of them were former prosecutors, and we
14 all took it as a threat.

15 And to put it in a perspective of 443, in addition to
16 the lawyers not wanting to take any money out of the trust
17 account because they believe themselves, after all these years
18 of being lawyers, to be at risk of getting criminally
19 prosecuted, I am not going to call an expert or potential
20 expert and say, what's your fee? And then they quote me a fee,
21 and then I say, I'm happy to give you this money, but I have to
22 warn you that there's a threat that this might be criminal --
23 these might be criminal proceeds, and I am going to spread that
24 risk that's already attributable to me, I am going to spread
25 that risk to you. Will you take that money and will you take

1 this case? The answer I am sure, as the Court knows, is going
2 to be no. That goes for my assistants in my office. Can I pay
3 you with criminal proceeds with threat of prosecution? The
4 answer, of course, is going to be no.

5 Can I -- when I call up the vendors to take the
6 discovery that we have to put it into a database so we can try
7 to use it, they are not going to take the money. If we want to
8 hire lawyers cheaper than our hourly rates to review those
9 documents, they are not going to take that money.

10 And I think ethically, all of the lawyers on this
11 case, would have an obligation, moral and ethical, to warn the
12 other parties that we are asking to help us to be aware of what
13 the government's position is.

14 And their position, as just articulated, is that every
15 dollar ever made by Backpage, no matter if it's for bicycle ads
16 or whatever, are tainted.

17 THE COURT: I don't know if he said every dollar.

18 MR. FEDER: He said, every dollar -- what I heard him
19 say is, every dollar, even if it's some other unrelated ad, not
20 just escort ads, but unrelated ads because it is all going into
21 the same bank accounts, that they are all tainted, 100 percent.

22 So we can't -- I can't, I will speak for myself and
23 Mr. Spear, I can't in good conscience bill hours. I am here
24 not billing hours since November 30, to try to get us some
25 time.

1 THE COURT: Since November 30 you have been working
2 basically pro bono on this case, that's fantastic.

3 MR. FEDER: I try to do my fair share of pro bono work
4 every year.

5 THE COURT: Does your client understand that?

6 MR. FEDER: I didn't understand this was going to
7 be -- this is not a voluntary pro bono. It is an involuntary
8 pro bono.

9 THE COURT: Oh, it's the pro bono until the money
10 kicks in and you'll take your money that you have earned.

11 MR. FEDER: Judge, I understand it seems a little
12 crass given the circumstances of the government shutdown.

13 THE COURT: I understand lawyers don't work for free,
14 for the most part.

15 MR. FEDER: But none of these lawyers, me included,
16 knew that they were going to seize fees when I signed on the
17 bottom line. The Luis case that Mr. Cambria was just talking
18 about, there was a threat -- and I have talked to the lawyer
19 that did the Luis case in Florida.

20 There was a threat there, and the lawyers in that case
21 went to the Court and basically made provisional notices of
22 representation that they would not get into the case unless the
23 money issue was resolved.

24 The Court there stayed the proceedings for -- on a
25 monthly or bimonthly basis until the case wound its way to the

1 Court of Appeals and then ultimately to the Supreme Court.

2 That's how they resolved that.

3 But the lawyers in this case were not understanding
4 that these fees were going to be seized. And at this point,
5 they now are, as of early November.

6 So if the Court doesn't want to look at it, I won't
7 give it to you, but I think to get a flavor, the Court might
8 want to look at how it was phrased and maybe understand how
9 defense lawyers who have been in this business for a long time
10 might have taken it.

11 THE COURT: You may approach.

12 MR. FEDER: Judge, unless the matters in the Central
13 District are unsealed, we should probably have this filed under
14 seal, if that's okay.

15 THE COURT: That is.

16 Well, Mr. Feder, I will do you one better. It is not
17 my intent to make this a part of the record. I am certainly
18 not going to read this into the record.

19 MR. FEDER: All right.

20 THE COURT: You know, Mr. Feder, I appreciate you
21 providing the Court with this information. To me, on page
22 number 12, it reiterates what Mr. Kucera just placed on the
23 record about, it's too speculative to know exactly what the
24 government may do at a future time.

25 But I appreciate that. So the Court is clear on it,

1 and I don't find any misconduct in any way. But I will tell
2 you this, that if I had a federal prosecutor, and I was the
3 defense counsel and heard a statement like that, I would
4 certainly seek some clarification.

5 But again, all of you have, for the most part, more
6 than 20, 30 years of experience, and I am sure with the
7 experienced lawyers on the government's side, these are some
8 things that you can meet and confer about just to make sure
9 that everyone is on the same sheet.

10 And Mr. Feder, between you and your colleagues that
11 have talked to me earlier, I am in a position now where I can
12 rule on 443. But if there's anyone that feels that they need
13 to talk to me to place their respective positions on the
14 record, I would allow it, and I will let you finish as well,
15 Mr. Feder.

16 MR. FEDER: I think I am finished. Thank you, Judge.

17 THE COURT: I appreciate that. Who is next? And my
18 apologies to all of you, but I have some time constraints now.
19 If you can limit your comments to 10 minutes, that would be
20 helpful.

21 MR. BIENERT: Your Honor, Thomas Bienert for defendant
22 Larkin, who is present today.

23 You specifically asked, what has changed since May?
24 Two things have changed, Your Honor, why we need and we think
25 it makes sense to hold off until some of the money issues get

1 ferreted out.

2 When I appeared in front of Your Honor in May, my
3 client, who has been an extremely successful businessman, who
4 has made many multiples of tens of millions of dollars over his
5 lengthy career -- my client is here. He is 69 years old, and
6 he is not a spring chicken like I am.

7 And he has made 15, 20 million dollars that have
8 nothing to do with Backpage through the businesses that he had,
9 like the Village Voice, Phoenix New Times, et cetera.

10 What has changed is since I appeared, the government
11 has seized over \$50 million of his assets. I do not have
12 funds. I am continuing to work, as is my 13-lawyer law firm.
13 We have a huge arrearage in this case, but we are continuing to
14 work on it.

15 So number one, what changed is the money. And what's
16 important, Your Honor, is this is not an indigent person. He
17 has plenty of money. It is just the government has and
18 continues to seize it, and we believe that they are doing it
19 illegally.

20 We understand that they say they're not, but what I
21 think -- this case has a few step-back-from-it moments. The
22 one thing we have not been on the defense side is lazy about
23 seeking adjudication of this issue.

24 We have been trying to litigate.

25 THE COURT: No, I have, I believe 36 or 39 pending

1 motions, so you have been far from lazy. The forfeiture issue
2 is very well briefed. There's only really three motions and
3 everybody joined in, but I know everyone has been working on
4 this case.

5 MR. BIENERT: Well, what I think is also important to
6 know is you are only one of four judges, Your Honor, that we
7 have raised this issue with, and that doesn't count the Ninth
8 Circuit where it is pending.

9 So the point is, we have been trying since, I think --
10 I forgot if we filed in July or August, to get a substantive
11 ruling or addressment, a hearing, on whether they are right
12 that they can seize all this money when much of it is not
13 traced to illegal activity, or whether we are right that they
14 can't.

15 And finally, we have the Ninth Circuit wanting
16 briefing on that issue as it relates to the first batch of
17 seizures, and we are literally towards the tail end of what
18 looks like multiple filings in a lengthy hearing in front of
19 Judge Oliver on the more recent batch. So everything is in
20 place.

21 I would also just say this. To reiterate that it is
22 not our doing, and we are reacting to the government's actions
23 that they believe they can take, but we certainly didn't
24 anticipate these.

25 And just by broad stroke, I believe there's over \$130

1 million of assets that have been seized by the government in
2 this case, as we stand here.

3 Even if we took the 90 percent is bad, which is way
4 off the mark, but let's assume that, there's \$13 million, it's
5 ten percent of that. We could start with the government
6 releasing \$13 million to the defendants so we can prepare our
7 defense, and then we wouldn't be having this discussion right
8 now.

9 THE COURT: Mr. Rapp, do you believe that the United
10 States Government would be willing to release millions at this
11 point?

12 MR. RAPP: No, we are not releasing any tainted funds.

13 MR. BIENERT: He says 10 percent are not tainted, so
14 that's what I am talking -- we can disagree about the 90
15 percent, and that should play out in litigation. But if we
16 just get the 10 percent that isn't -- is the part that even
17 they acknowledge they can't show is illegal, that would get us
18 past this hurdle and at least allow us to start working in
19 earnest.

20 And then the last thing I will say and I will sit
21 down, is just to reiterate, this isn't just about lawyers
22 wanting to get our money. Obviously, Your Honor, ironically,
23 we all know, in this courtroom, everybody working for Your
24 Honor and on this side of the table know all too well, that
25 sometimes people work without money. I did it when I was a

1 federal prosecutor as well.

2 But even trying to do things, we can't hire the
3 vendors. We have millions of dollars in needs to get document
4 hosting and document searching. We can't do it. And I think
5 the government's list that they submitted in December, they
6 gave us, I think December 16th, their preliminary list of
7 experts. It is 10 experts.

8 Now, you will get a lot of motions down the line about
9 whether we believe those were appropriate or not. I am sure
10 there will be motions in limine and that type of thing, but I
11 can't hire one expert, certainly not 10. So that's the
12 problem.

13 And then finally, I will leave you with this. In
14 terms of the volume of what we still don't have -- so first of
15 all, we can't get to the ten million documents because we need
16 document hosting and searching and we can't pay for that.

17 But the letter that was sent by the government on
18 December 10th, you were asking about percentages of what's
19 produced, they say, well, if you take out the servers, we think
20 95 percent. But that's ignoring the elephant in the room.

21 According to the government's letter to us December
22 10th, just the servers that are being -- that have been seized
23 here in Arizona, the 32 servers, they say, we estimate the
24 capacity at approximately 500 terabytes.

25 Now, we have been given so far two terabytes. So this

1 is literally exponentially more than that. So we still don't
2 have all of that. And here's why we need -- I am not saying we
3 have to go through every document, we don't, but we certainly
4 have to know what they are.

5 We need to be able to categorize for ourselves, and no
6 offense to the government, but we want to determine for
7 ourselves what's important and what's not. And we want to
8 know -- I would want to know, what are the categories that are
9 on that?

10 They mention that these documents -- that Backpage has
11 ads in 94 countries. Many of those countries, prostitution is
12 legal and so are ads for them. And it's important for us as
13 defense counsel, for example, to be able to categorize what is
14 clearly from another country, what is not.

15 Is the government trying to use some examples in this
16 case, that frankly were for another country and therefore they
17 weren't illegal. Things like that we have a right to know.

18 The other thing is I thought counsel said that the
19 servers contain emails. I would think they contain emails.
20 Obviously, as Your Honor knows, emails are very important. So
21 we need to get the servers, and if I am following their letter,
22 they still owe us -- they have only given us five or 10 percent
23 of the discovery.

24 And of course, we can't even begin to wrap our arms
25 around that if we don't have funds to be able to do this. And

1 then finally, this isn't the kind of case -- first of all, I
2 couldn't do this case as a panel lawyer, because I am
3 responsible for 25 employees and 14 lawyers, and I can't do
4 my -- in my firm, it can't happen.

5 But more importantly, we are entitled to counsel of
6 choice. My client has the money. We just need to litigate or
7 resolve getting the appropriate money back that they can't show
8 is tainted, and we can litigate the case.

9 And it certainly would be inappropriate, I believe,
10 and I also think it is not what the law envisions, to somehow
11 try to saddle the taxpayer with paying CJA fees, when frankly
12 we don't need to. We just need to have addressment of the
13 funds they have that we believe our client should have.

14 On that basis, Your Honor, I am done.

15 THE COURT: Thank you, sir.

16 MR. CORN-REVERE: Morning, Your Honor. I am Robert
17 Corn-Revere for Mr. Larkin and Lacey.

18 THE COURT: Good morning, again.

19 MR. CORN-REVERE: I just wanted to place a couple of
20 things on the record as the issues have come up. One is,
21 earlier Your Honor asked about what it means to maintain a
22 status quo, whether or not the lawyers on the team --

23 MR. RAPP: Judge, I am going to object here for a
24 minute, if I may? Mr. Lacey's attorney and Mr. Larkin's
25 attorney already addressed the Court. Are we going to hear the

1 same from yet a second attorney for Mr. Lacey and Larkin?

2 THE COURT: Mr. Rapp, thank you for that.

3 What do you have to offer me that is different than
4 what I have already heard? If you can limit your comments to
5 that, that would be helpful.

6 MR. CORN-REVERE: I am going to try and do that, Your
7 Honor. And it's really just two brief things. One is just to
8 confirm that Davis Wright Tremaine also has had its IOLTA funds
9 seized by the government, and we have been working diligently
10 on the case for months now, without prospect of being paid.

11 And it's not that people are treading water just
12 waiting for something to happen; people are working hard on the
13 case. The second thing is, and that's just to point out as
14 First Amendment counsel in the case, that the issues that are
15 pending in the Ninth Circuit have an overarching effect both on
16 the positions being considered today, the motion being
17 considered today, and for the future conduct of the case.

18 So, for example, the government estimates that 90
19 percent of the funds from Backpage were tainted, or actually if
20 you take Mr. Rapp's latest comment, he believes that everything
21 is tainted.

22 That's based on the argument that is being made in the
23 Ninth Circuit, that adult ads are the same as illegal ads. So
24 right off the bat, the government's estimate of what they are
25 entitled to seize is off for that reason.

1 And for that reason, the ruling by the Ninth Circuit
2 is going to clarify a lot about both the state of the seized
3 assets and also about the government's assumptions and bringing
4 the prosecution in the first place. So it makes good sense as
5 a case management matter simply to see what the Ninth Circuit
6 has to say on these issues.

7 THE COURT: I appreciate that.

8 Mr. Stone, do you or your colleagues have any final
9 remarks?

10 Mr. Rapp, you are standing. Come on up.

11 MR. RAPP: Well, let me just start with
12 Mr. Corn-Revere. This is Davis Wright Tremaine's signature
13 move in this case. Is they go into a civil case and claim
14 there ought to be a stay, things ought to stop because there's
15 a criminal case going on.

16 This is an interesting twist, coming into this
17 criminal case saying, you should stop everything because there
18 is a civil case going on in California. It's sort of the tail
19 wagging the dog. Everything should stop here because they are
20 litigating this issue with respect to the seizures of the IOLTA
21 accounts.

22 There is a history of delay with Backpage. One, we
23 have to look no further than the California state case where
24 the judge issued sanctions for just this type of delay.

25 This is to the firm of Davis Wright Tremaine. "I am

1 going to grant the motion for sanctions. I believe an adequate
2 record has been made supporting sanctions in this case for a
3 number of reasons, all listed by the plaintiffs, but also the
4 Court looks at what constitutes a bad faith.

5 "And there are three ways the Court can look at it.
6 Pre-litigation misconduct. I am finding that given the history
7 of the defendants in this case, in the multiple cases they have
8 had, not just before this Court, I have had two, not just in
9 this state but nationally, it is clear to this Court that their
10 conduct was to necessitate delay where there were what appears
11 to be clearly valid claims or rights being asserted by the
12 plaintiff, which months and years later" --

13 THE COURT: Mr. Rapp, before you finish reading all of
14 that, which I have heard enough of that actually, what you're
15 placing on the record, did it deal with the fund issue that we
16 have been dealing with?

17 MR. RAPP: You know what, I can talk about the fund
18 issue.

19 THE COURT: That's a yes-or-no question.

20 MR. RAPP: This transcript, no, just deals with --

21 THE COURT: Generally delaying the case?

22 MR. RAPP: Yes.

23 THE COURT: But they didn't have the same argument
24 about, we don't have money to do our jobs?

25 MR. RAPP: Well, Davis Wright Tremaine is not going to

1 argue they are not getting money from Backpage. They are
2 getting money, clean money from Backpage. Clean money.

3 They got 100,000 in August. We are not taking that.
4 That's clean money. So Spear, Brunst, Lacey, and Larkin, have
5 separate money from the sale of the alternative weeklies. They
6 are getting money that we view as clean, legitimate money, and
7 they are funneling it through another lawyer's account and
8 disbursing it out.

9 THE COURT: Why do you use the funneling through
10 analogy? Because that just sounds unseemly.

11 MR. RAPP: Well, it's a con move, however you want
12 to -- look, here's the point. They are getting money, and
13 under Monsanto, come to us, show us your financials, we will
14 look at your financials, and if you have no legitimate money,
15 then maybe we can have a discussion. But they won't do that.
16 They won't do that.

17 So you have to know the history of the case. These --
18 many of the attorneys on this case who came to us shortly after
19 arrest, they knew that the tracing of illegitimate and
20 legitimate money was a problem. And some of them said, look,
21 we have an account, we think this is legitimate money. This
22 doesn't -- should not come as a surprise to them.

23 If by analogy, if this was a drug trafficking case,
24 and the kingpin of the cartel gave drug revenue out to various
25 attorneys before being arrested and indicted, and that same

1 kingpin was arrested and indicted and pled guilty and agreed
2 that he was running a criminal enterprise and that the revenue
3 from the criminal enterprise was dirty, and then he pled
4 guilty, the entire cartel, anybody looking at this would know
5 that there's a good chance that the money is all tainted.

6 That's the same case here. It is no different.

7 Backpage was a criminal enterprise from its inception.

8 Now, they don't want to address the First Amendment
9 arguments that we responded to in 446, but if you look at the
10 business practices they were engaging in, and they have never
11 ever responded to those, in any of the letters I have sent
12 them, in any of the pleadings, they won't stand up here and try
13 to defend the financial relationship with the Erotic Review,
14 with the aggregation of ads from other prostitution websites,
15 because they can't.

16 Because they are running a criminal enterprise, and
17 every dollar that they make is dirty or it's commingled with
18 the very de minimis amount of money that is legitimate -- that
19 they say is legitimate, I guess, from selling bicycles and
20 couches, which was such an incredibly small fraction of
21 Backpage's business model that it is not even worth talking
22 about.

23 So they have a remedy, Monsanto. Come to us, show us
24 your financials. Maybe you can trigger a Monsanto hearing, and
25 we can look at your financials, or don't. And then find money

1 from your legitimate source to fund your defense.

2 THE COURT: Mr. Rapp, I appreciate that.

3 Mr. Piccarreta, since you are the one that basically
4 filed 443, I will give you the last word. I will give you
5 three minutes.

6 MR. PICCARRETA: Judge, we haven't had a factual
7 hearing yet to defend the allegations of the government, so for
8 them to assume we haven't defended yet, we haven't gotten to
9 that stage. We have plenty of defenses.

10 Two, they know under United States versus Vera, the
11 Ninth Circuit is very clear that a guilty plea cannot -- facts
12 contained in it cannot be used against other defendants because
13 it's inherently unreliable. I can give you the cite on Vera.

14 THE COURT: I am familiar with it.

15 MR. PICCARRETA: And finally, Judge, there's been a
16 lot of slander of Davis Wright Tremaine. They seem to be the
17 target of these guys, but they are a very reputable --

18 THE COURT: Another fire bomb legal term when you
19 start throwing away slander and -- bring out slander and
20 prosecutorial misconduct and threats and all of this. You all
21 are senior enough that when you start launching these different
22 types of allegations and accusations, you should be prepared to
23 have an affidavit signed by you and notarized to a state bar
24 that this person is engaging in this conduct.

25 If you are not prepared to do that, in this case -- I

1 don't know if it is your practice some other place -- but save
2 that for when you leave the courtroom. Because when you place
3 it on the record like this, it's very difficult to unring that
4 bell.

5 And I'm pretty confident that all of you are very
6 proud about what you have accomplished as lawyers, prosecutors,
7 defenders, whatever you have taken on as a lawyer. And you
8 don't want to have your reputation sullied that way, so if you
9 could take this outside of the courtroom.

10 But if you are seeking a remedy from me for some form
11 of misconduct, please bring it up in this courtroom. If you
12 are not, leave the name calling out of this litigation.

13 Go ahead.

14 MR. PICCARRETA: I wasn't trying to call names, I was
15 just responding to what was --

16 THE COURT: When you talk about slander, that's
17 exactly what you are doing. Go ahead.

18 MR. PICCARRETA: All right. I did not believe it was
19 fair to make those accusations. But put that all aside, we are
20 all here today as a result of the government's seizure of IOLTA
21 accounts in November of this year.

22 And that has wreaked havoc on my client, my defense,
23 and my ability to get funds. And that's why we are here today
24 asking you to stay the proceeding, at least for the defense
25 obligations until the next status conference so we can

1 determine whether we have adequate funds to defend or whether
2 we have to file pleadings and go from there. That's all we are
3 asking.

4 I am not involved in the other cases or whatever they
5 are referring to. We are here with a legitimate gripe. We
6 didn't serve the warrant on ourselves. That wasn't discussed
7 with us. It was dropped on our lap on November 7th, and that's
8 why we are here today, Judge.

9 THE COURT: I really appreciate that.

10 First of all, I want to thank all of you for your well
11 thought out arguments that you've presented to the Court. It
12 is all very, very helpful.

13 This Court is in receipt of Document Number 443, which
14 is the defendants' joint status report. This Court, after
15 reading the 15-page document several times, I will consider it
16 as a motion requesting a continuance or as was described
17 earlier by Mr. Piccarreta, a request to stay the defendants'
18 obligations.

19 This Court is also in receipt of Document Number 444,
20 which is the United States Government's memorandum, and I also
21 have Document Number 446 that I have also considered, which is
22 the United States' response to defendants' joint status report.

23 After careful consideration of all of the arguments of
24 counsel, and I certainly understand the issues concerning both
25 sides and the litigation generally and some of the hardships

1 that the defense counsels may be going through to adequately
2 make sure that their clients are prepared for trial.

3 After carefully considering all of the issues, the
4 motion, which is Document Number 443, will be denied.

5 The current deadlines in the scheduling order that are
6 spelled out in Document Number 131, the government and defense,
7 I am ordering you both to continue to meet those deadlines.

8 In the event that the Ninth Circuit Court of Appeals
9 comes out with a decision, and that decision is one in which
10 this District Court needs to act on it based on if funds are
11 freed or whatever way that they decide the case and send it
12 back to the District Court, I look forward to weighing in on
13 those issues.

14 Mr. Feder, I appreciate you providing me with a copy
15 of this document that is currently under seal. I don't want
16 it. It's a sealed document.

17 Lisa, if you can return that to Mr. Feder.

18 And the hearing is adjourned.

19 (Proceedings conclude at 11:28 a.m.)

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C E R T I F I C A T E

I, ELVA CRUZ-LAUER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 6th day of February,
2019.

s/Elva Cruz-Lauer
Elva Cruz-Lauer, RMR, CRR